Supreme Court, U.S.
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No. ——

In The Supreme Court of the United States

October Term, 1995

Praxair, Inc.,
Petitioner,

v.

Florida Power & Light Company and
Florida Power Corporation,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

Carter G. Phillips
Sidley & Austin
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

Nathan P. Eimer
Constantine L. Trela, Jr.*
David D. Meyer
Sidley & Austin
One First National Plaza
Chicago, Illinois 60603
(312) 853-7000

Counsel for Petitioner

* Counsel of Record

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QUESTION PRESENTED

Whether a state agency may retroactively confer antitrust immunity under the state action doctrine upon past private anticompetitive conduct?

LIST OF PARTIES AND AFFILIATES

In addition to the parties listed in the caption, Union Carbide Corporation ("Union Carbide"), a New York corporation, was the original plaintiff in this action. After Union Carbide filed this action, it spun off the assets and business that are at issue here, creating Praxair, Inc. On December 21, 1993, the district court entered an order substituting Praxair for Union Carbide as the party plaintiff, and Praxair is the sole petitioner in this Court.

Pursuant to S. Ct. Rule 29.1, Praxair states that it has no parent company. Its subsidiaries, other than wholly-owned subsidiaries, are:

Altair Gases and Equipment, Inc.
Argon, S.A.
Beijing Praxair, Inc.
Gas Tech, Incorporated
GenEx, Ltd.
Jacksonville Welding Supply, Inc.
Linde de Mexico, S.A. de C.V.
Maxima Air Separation Center Limited
P. T. Praxair Indonesia
Praxair Korea Company Limited
RIVOIRA S.p.A.
Shanghai Praxair Baosteel, Inc.
Wellnite Services

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Praxair, Inc. ("Praxair"), respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is included in the Appendix at pp. 1a-9a; it is reported at 64 F.3d 609. The order of the court of appeals denying Praxair's petition for rehearing and suggestion of rehearing *en banc* is included in the Appendix at 29a-30a. The opinion and order of the United States District Court for the Middle District of Florida denying the parties' cross-motions for summary judgment is unreported and is included in the Appendix at 10a-28a. The district court's order denying

the parties' cross-motions for reconsideration, which also is unreported, is included in the Appendix at 31a-33a.

JURISDICTION

The court of appeals entered its opinion and judgment in this case on September 19, 1995. Praxair filed a timely suggestion of rehearing *en banc*, which, pursuant to Eleventh Circuit Rule 35-6, was also treated as a petition for rehearing by the panel. The court of appeals denied Praxair's petition for rehearing and suggestion of rehearing *en banc* on December 15, 1995. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254.

STATUTE INVOLVED

Section 1 of the Sherman Antitrust Act makes unlawful "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations . . . ." 15 U.S.C. § 1.

STATEMENT OF THE CASE

The question in this case is whether a State may retroactively confer immunity from federal antitrust scrutiny upon a purely private agreement to allocate service territories—a private agreement that, at the time of its undertaking and for years thereafter, operated without state approval and constituted a *per se* violation of the Sherman Act. The facts that underlie this question are largely undisputed, although the parties have contested the inferences that should be drawn from these facts. Because the court of appeals directed the entry of summary judgment against petitioner, however, all reasonable inferences must be drawn in petitioner's favor. *See Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *Matsushita Elec. Indus. Corp.* v. *Zenith Radio Corp.*, 475 U.S. 574, 587-88 (1986).

1. Electric power in Florida, insofar as is relevant here, is provided by one of two utilities: Florida Power

& Light Company ("FPL") and Florida Power Corporation ("FPC"). As Florida's population boomed in the middle decades of this century, expanding into regions that formerly had been largely undeveloped, the two utilities entered into a series of agreements allocating exclusive service territories between themselves. Rather than divide the State in a single comprehensive agreement, however, the utilities allocated territories in a piecemeal fashion that kept pace with commercial and residential development. In 1958, for example, FPL and FPC agreed upon a territorial division of Volusia and Seminole Counties in east central Florida. Four years later, as development pushed south into Orange and Osceola Counties and the utilities found themselves in competition for newly-developed communities there, FPL and FPC again negotiated a territorial allocation and struck an agreement that eliminated competition between them in the assigned territories.

These 1958 and 1962 pacts were memorialized in private "letter agreements" between the utilities, and the division of territories was indicated by a red line drawn through highway maps of the four affected counties. Under the agreements, FPL was given the exclusive right to sell electric power in eastern Volusia and Seminole Counties, and FPC was given the exclusive right to sell electric power in western Volusia and Seminole Counties, in the entirety of Orange County, and in a portion of Osceola County.

FPL and FPC submitted these territorial agreements to the Florida Public Utilities Commission, now known as the Florida Public Service Commission ("the Commission"), for approval in June 1964. As the court of appeals noted, Florida law permits electric utilities to allocate territories, but requires that such agreements be approved by the Commission. 64 F.3d at 612, App. at 5a; *see also City Gas Co.* v. *Peoples Gas Sys., Inc.*, 182 So.2d 429, 436 (Fla. 1965).

In its application for Commission approval, FPL stated that the territorial division concerned only Volusia, Seminole, Orange, and Osceola Counties and that it left "unresolved" the issue of how to allocate other territories.[1] Consistent with this representation, the Commission docketed the matter under the caption, "In the Matter of Application of Florida Power and Light Company and Florida Power Corporation for approval of a territorial agreement relative to their respective service areas in *Volusia, Seminole, Orange, and Osceola counties*" (emphasis added). Similarly, when the Commission, as it was required to do under Florida law, sent notice of its public hearing on the application to all affected parties, it directed the notice to the governments of only the four named counties. *See* App. 12a. References to the proposed territorial allocation in the notices and in an en-

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[1] FPL's application described the proposed territorial allocation as follows:

> "[U]nder date of October 28, 1958, the Company [FPL] and Florida Power [FPC] entered into an Agreement constituting an administrative working arrangement whereunder the areas in *Volusia and Seminole Counties* were allocated between the two so that each would have its own service area which it could serve without threat of competition from the other. Under date of September 4, 1962, this agreement was amended so as to extend the original agreement to *Orange and Osceola Counties*. . . .
>
> . . . .
>
> "The Company realizes that th[is] Agreement is not comprehensive in that it leaves unresolved territorial problems which have and may arise between the Company and Florida Power. Applicant, however, alleges that the Agreement is the result of long, arduous, arms-length bargaining and negotiations between two entities and that the Agreement represents the areas and problems which the parties have been able to resolve for the future, which problems are not resolved by existing law."

Application of Florida Power & Light Company for Approval of an Agreement with Florida Power Corporation Relative to Service Areas ¶¶ 12, 14 (June 2, 1964) (RF-149-T4) (emphasis added).

gineering evaluation performed by the Commission consistently described the allocation as establishing utility service boundaries *only* for the counties of "Volusia, Seminole, Orange, and Osceola." *See* Florida Public Util. Comm'n Notice of Hearing (RF-39-88); Memorandum from Florida Public Util. Comm'n Engin. Dep't to Comm'n Exec. Sec'y, at p. 2 (Jan. 9, 1965) (RF-39-91). Following a hearing on the territorial allocation, at which the tendered agreements repeatedly were described as affecting only Volusia, Seminole, Orange, and Osceola Counties, the Commission issued an order on April 28, 1965, approving the territorial division. *See* App. 34a-38a (hereafter, "the 1965 Order").

2. In 1965—the same year in which the Commission approved the utilities' allocation of territory in Volusia, Seminole, Orange, and Osceola Counties—petitioner opened an industrial gas plant in Brevard County, which lies adjacent to and just east of Orange and Osceola Counties.[2] Since that time, Praxair has purchased its electric power solely from FPL.

Over the years, FPL's rates surged sharply higher than FPC's, and Praxair resolved to seek alternative sources of electric power. In August 1988, after FPL refused to negotiate a lower rate, Praxair asked FPC to sell it electric power. FPC, which was capable of delivering electric power to Praxair over existing FPL lines without any capital expenditure—a practice known in the industry as "wheeling"—refused on the grounds that Praxair's Brevard County plant fell within the exclusive service territory assigned by the utilities to FPL. FPL, too, affirmed that it would not deliver or wheel electricity

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[2] Union Carbide Corporation ("Union Carbide") opened the Brevard County plant and operated it until it created Praxair in 1992. The plant is now owned by Praxair, which on December 21, 1993, formally replaced Union Carbide as plaintiff in this action. For simplicity, Praxair and its predecessor are referred to collectively as "Praxair" throughout this petition.

generated by FPC to Praxair because of the utilities' territorial allocation of Brevard County to FPL.

3. On October 14, 1988, Praxair filed suit in the United States District Court for the Middle District of Florida against both FPL and FPC, alleging that the two had violated section 1 of the Sherman Act by conspiring to restrain trade through their territorial allocation of Brevard County. Virtually simultaneously, FPL asked the Florida Public Service Commission to issue a declaration validating the utilities' territorial allocation of Brevard County. In February 1989, the Commission complied, issuing a declaratory statement in which it construed its 1965 Order as impliedly assigning Brevard County to FPL's exclusive territory. *See In re: Petition of Florida Power and Light Company for a Declaratory Statement Regarding Request for Wheeling,* Order No. 20808, Docket No. 881326-EI (Feb. 24, 1989) (App. 39a-54a).

All parties moved for summary judgment in the district court. FPL and FPC freely acknowledged that they had agreed not to compete in Brevard County and that FPL therefore enjoyed a monopoly in the sale of electric power within the county. There was also no real dispute that this territorial division, in the absence of any valid claim of immunity, would constitute a *per se* violation of the Sherman Act. *See Palmer* v. *BRG of Georgia, Inc.*, 498 U.S. 46, 49 (1990) (per curiam); *United States* v. *Topco Associates, Inc.*, 405 U.S. 596, 608 (1972). Indeed, "[t]his Court has reiterated time and again that '[h]orizontal territorial limitations . . . are naked restraints of trade with no purpose except stifling of competition.'" *Palmer,* 498 U.S. at 49 (quoting *Topco,* 405 U.S. at 608). Because the utilities' sole defense to the Sherman Act claim was that their conduct enjoyed immunity under the state action doctrine, the central question in the case was whether the State had in fact approved the utilities' allocation of Brevard County to FPL. Al-

though the parties agreed that this issue should be decided based upon available documentary evidence, they disagreed over the inferences to be drawn from that evidence.

In support of its motion for summary judgment, Praxair pointed out that the utilities' 1958 and 1962 letter agreements expressly purported to allocate territories only in four named counties—Volusia, Seminole, Orange, and Osceola. The limited nature of this territorial division was confirmed in maps that were appended to the letter agreements to illustrate the negotiated dividing line: the utilities included official county highway maps only for Volusia, Seminole, Orange, and Osceola Counties. Praxair further observed that the Florida Public Service Commission's public notices concerning the utilities' application for approval of these agreements likewise represented that the territorial allocations affected only Volusia, Seminole, Orange, and Osceola Counties. The undisputed evidence further showed that when the Commission sent the required notice of the public hearing on the matter to public officials in affected localities, it sent notices only to officials in Volusia, Seminole, Orange, and Osceola Counties. Thus, as the district court found, "[a]t no time during the application or approval process did FPL, FPC or the Commission definitively state that FPL would exclusively provide service to Brevard County." App. 22a.[3] Indeed,

[3] The transcript of the Commission's 1964 hearing contains only three isolated and offhand references to Brevard County. The first occurred during the opening statement of FPL's counsel, when he observed that the FPL and FPC "systems were growing closer together in the area of the boundary between Orange and Brevard and Osceola and Brevard counties." (RF-149-T5-5.) The second reference, during the testimony of FPL witness A.B. Wright, similarly adverted to burgeoning competition between FPL and FPC "in the Volusia and Seminole county areas, and to a lesser, but nevertheless important, degree, in the Orange-Brevard County and Osceola-Brevard County areas." (RF-149-T5-10.) The only other mention of Brevard County came from FPL witness B.H. Fuqua, who stated that FPL's and FPC's "territories were growing closer together . . . . in the areas of Volusia, Seminole, Orange,

to the contrary, FPL's request for Commission approval of the 1958 and 1962 letter agreements expressly acknowledged that they were "not comprehensive" and left "unresolved" the question of how other counties would be serviced by the utilities. *See supra* at p. 4, n.1.

FPL and FPC did not dispute this evidence, but urged the district court to find that Brevard County had been impliedly allocated to FPL under the 1958 and 1962 letter agreements submitted for Commission approval. The utilities pointed out that the line marking FPC's territory on the highway maps of Orange and Osceola Counties appended to the 1962 letter agreement traced the eastern boundary of those counties. Because Brevard County lies to the east of Orange and Osceola Counties, the utilities argued, it had impliedly been allocated to FPL. The utilities further pointed out that the Commission between 1981 and 1987 had devised comprehensive maps of established utility service markets in Florida, and that Brevard County was shown within FPL's territory on those maps. The utilities also relied heavily on the Commission's 1989 declaratory statement—issued after this lawsuit had been filed—in which the Commission construed its 1965 Order as impliedly allocating Brevard County to FPL.

4. The district court denied the motions for summary judgment. Applying the two-pronged test set out in *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), the district court observed that "[t]o establish [state-action] immunity, a party must show (1) that the challenged restraint on competition is one 'clearly articulated and affirmatively expressed as state

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Osceola, and Brevard counties." (RF-149-T5-33.) No participant at the hearing, however, stated that the territorial agreements under submission would resolve the issue of competition in Brevard County. Rather, from the context of the statements at the hearing, it reasonably appeared that the utilities intended to reserve that question for another day.

policy' and (2) that 'the policy [is] actively supervised by the State itself.'" App. 17a (quoting *Midcal*, 445 U.S. at 105). The district court then held that Florida's "clearly articulated" policy is to permit the use of exclusive territories for the sale of electric power, but *only* when such territorial agreements have been submitted to and approved by the Florida Public Service Commission. *See* App. 20a (citing *City Gas Co.*, 182 So.2d at 436). Accordingly, in this case, "if FPL and FPC denied FPC's service to Plaintiff pursuant to a territorial agreement, and such agreement was never approved by the Commission, the actions of FPL and FPC would not merit state action immunity protection." App. 20a-21a. Reviewing the documentary evidence relating to the Commission's 1965 Order, the court found that "[s]uch documentation gives rise to conflicting interpretations of the intent of Defendants and the Commission regarding the provision of service in Brevard County." App. 22a. The court thus concluded that a genuine issue of material fact—whether the Commission had intended in 1965 to approve any allocation of territory in Brevard County—precluded summary judgment.

5. All parties took an immediate appeal from the district court's denial of summary judgment.[4] The United States Court of Appeals for the Eleventh Circuit reversed and entered summary judgment in favor of the utilities. It agreed that the determinative issue was whether the Commission had in fact approved the utilities' territorial allocation of Brevard County, but it disagreed with the district court that this issue was to be resolved by reference to the Commission's action in 1965. *See* 64 F.3d at 612, App. 5a. Rather, the court of appeals stated that the

[4] The court of appeals had jurisdiction over these appeals under the collateral-order doctrine and the established rule that "[d]enial of state action immunity from antitrust liability by summary judgment is immediately appealable." 64 F.3d at 611, App. 2a (collecting cases).

proper inquiry was "whether, in the order approving the territorial agreement *or in events since that time*, there has been sufficient 'state action' by the Florida Public Service Commission which would allow FPC and FPL to divide service territories in Brevard County." 64 F.3d at 611, App. 3a (emphasis in original).

Having redirected the legal inquiry away from whether the Commission approved the private anticompetitive pact at the time of its making to whether the Commission approved the pact at some point thereafter, the court of appeals turned to the evidence in this case. The court first found the evidence inconclusive with respect to whether Brevard County fell within the scope of the Commission's 1965 Order. Although the court thought it "entirely plausible" and "[a] logical interpretation" of the 1965 Order to infer that Brevard County was silently allocated to FPL by the Commission in 1965, *see* 64 F.3d at 613, App. 7a, the court's judgment did not rest on that ground.[5] Instead, the court of appeals held that "[e]ven if it was not clearly intended in the original agreements to include Brevard County, . . . the way the parties and particularly the Commission have conducted themselves since that time indicates that Brevard County has been allocated to FPL's service area." 64 F.3d at 613, App. 8a. Specifically, the court pointed to the Commission's conduct in the 1980s, when it developed maps showing Brevard County in FPL's service territory, and to the Commission's 1989 declaratory statement. *See*

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[5] Nor, of course, could the court properly have entered summary judgment against Praxair on that basis, in light of the established rule that "[i]f reasonable minds might differ on the inferences arising from undisputed facts, then the court should deny summary judgment." *Warrior Tombigbee Transp. Co. v. M/V Nan Fung*, 695 F.2d 1294, 1296-97 (11th Cir. 1983). The Eleventh Circuit's conclusion that it was an "entirely plausible" inference that Brevard County had been impliedly allocated by the 1965 Order stopped pointedly short of holding that this was the *only* plausible inference that could be drawn from the record.

64 F.3d at 613-14, App. 8a. The court held that this recent governmental conduct was sufficient to confer state-action immunity on the utilities' early-1960s pact to abolish competition in Brevard County.

The court of appeals denied Praxair's petition for rehearing and suggestion of rehearing *en banc*. App. 29a.

REASONS FOR GRANTING THE PETITION

Certiorari should be granted in this case for two reasons. *First*, the decision below creates a conflict with the Ninth Circuit over whether a state agency may confer retroactive state-action immunity upon the past anticompetitive conduct of private parties. *Second*, the Eleventh Circuit's decision upholding such a *post hoc* grant of immunity presents squarely a choice between two competing models of the state action doctrine, the persistence of which has resulted in muddled decisionmaking in the lower courts. This Court's review thus would settle an issue of fundamental importance to federal antitrust policy and provide much-needed clarity with respect to the scope of the state action doctrine.

1. The ruling below that a state agency's *post hoc* approval can immunize the past anticompetitive conduct of private parties is in conflict with the rule of law announced in the Ninth Circuit's recent decision in *Columbia Steel Casting Co.* v. *Portland General Electric Co.*, 60 F.3d 1390 (9th Cir. 1995). Presented with a substantially identical Sherman Act challenge to exclusive utility service territories in Portland, Oregon, the Ninth Circuit held that a state agency's *post hoc* approval of such territories cannot retroactively confer state-action immunity upon private conduct undertaken to create and enforce those territories years earlier. *See id.* at 1398 n.7. The conflict between the rule applied by the Ninth Circuit and the rule applied in the decision below is apparent from a brief comparison of the two cases.

The plaintiff in *Columbia Steel Casting* was a customer of Portland General Electric Company ("PGE") who sought to purchase electric power from Portland's other electric utility, Pacific Power & Light. When PGE objected on the ground that the plaintiff was located in PGE's exclusive service territory under a 1972 agreement with Pacific Power & Light, the plaintiff sued, alleging that the utilities' territorial pact violated the Sherman Act. PGE claimed immunity under the state action doctrine, arguing that the pact had been approved in a 1972 order of the Oregon Public Utilities Commission ("PUC"). PGE also sought a declaratory statement by the PUC affirming that its 1972 order had approved the territorial division; like the Florida Commission in this case, the Oregon PUC obliged by issuing "a declaratory order, stating that while 'perhaps [the 1972 Order] did not unambiguously allocate exclusive service territories to PGE and PP & L,' it was the PUC's intent to approve such an allocation." 60 F.3d at 1394.

Although the Ninth Circuit ultimately held that PGE was entitled to protection under the state action doctrine, the court made clear that the determinative question was whether it was reasonably foreseeable to the Oregon PUC, *when it acted in 1972*, that its approval of the utilities' agreement would create exclusive service territories. In so holding, the court of appeals expressly refused to accord significance to the agency's post-litigation attempts to reach back in time and retroactively "immunize" private exclusionary conduct that had occurred years earlier. *Id.* at 1398 n.7. The Ninth Circuit reasoned:

> "Of course, PGE cannot base its foreseeability argument on the clarifications made by the PUC *after* the anticompetitive conduct at issue in this case, since it could not have relied upon those statements when it decided to oppose the transfer of Columbia to PP & L. The question is whether the anticompetitive actions were authorized when undertaken, which

> turns on whether they were a foreseeable consequence of the actions the PUC had taken up to that point. Thus, neither the PUC's retroactive amendment of its 1972 Order in 1992, nor its litigation positions in this case, can create PGE immunity for actions taken in 1989-90."

Id. (emphasis in original).

The Ninth Circuit's conclusion that the Oregon PUC in 1992 could not retroactively confer state-action immunity upon private exclusionary conduct that had occurred two years earlier is squarely in conflict with the Eleventh Circuit's conclusion in this case. Here, the Eleventh Circuit effectively acknowledged that summary judgment could not be granted to the utilities based upon the Florida Public Service Commission's 1965 Order, but went on to find that the utilities' conduct had been retroactively immunized by the Commission's conduct in the 1980s—including, in particular, its post-litigation declaratory statement. *See* 64 F.3d at 613-14, App. 8a. The Eleventh Circuit thus based its holding upon precisely the sort of *post hoc* agency actions that the Ninth Circuit held could not confer retroactive immunity.

2. This conflict between the Ninth and Eleventh Circuits warrants immediate resolution by this Court because the question over which they have divided goes to the very foundation of the state action doctrine and carries broad implications for other cases. The Ninth and Eleventh Circuits' conflicting formulations reflect two fundamentally different models of the state action doctrine. Although this Court's cases strongly suggest that the Ninth Circuit has adhered to the correct understanding of the doctrine's theoretical basis, the persistence of these two competing models has resulted in significant confusion and erratic results in the lower courts.

a. When this Court first articulated the state action doctrine in *Parker* v. *Brown*, 317 U.S. 341 (1943), it immunized only the conduct of state officials from anti-

trust liability. This Court found in the Sherman Act "no mention of the state as such, and . . . no hint that it was intended to restrain state action or official action directed by a state." *Id.* at 351. "In a dual system of government in which, under the Constitution, the states are sovereign," the Court reasoned, "an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." *Id.*

This Court later extended the state action doctrine to shield the conduct of private parties when the State has *authorized* or *directed* their actions as a matter of state policy. Thus, in *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), this Court held that private anticompetitive conduct may be immune from antitrust liability when "the challenged restraint [is] . . . 'one clearly articulated and affirmatively expressed as state policy' . . . [and] the policy [is] . . . 'actively supervised' by the State itself." *Id.* at 105 (citations omitted).

This Court has offered two related rationales for extending *Parker* immunity to private actors. *First,* the Court has observed that "there may be cases in which the State's participation in a decision [to restrain trade] is so dominant that it would be unfair to hold a private party responsible for his conduct in implementing it." *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579, 594-95 (1976). *Second,* the Court has reasoned that it would seriously undercut the authority of the States to implement their own policies—the very authority that *Parker* sought to vindicate—if private parties could be held liable for conduct taken at the State's behest. *E.g., Patrick* v. *Burget,* 486 U.S. 94, 100 (1988) ("If the Federal Government or a private litigant always could enforce the Sherman Act against private parties, then a State could not effectively implement a program restraining competition among them."). At the same time, this Court has emphasized that state-action immunity for private parties remains "disfavored," *FTC* v. *Ticor Title Ins. Co.*, 504 U.S. 621, 636 (1992), and should not be expanded

beyond the scope necessary to serve these policy rationales. At bottom, this Court has "sought to ensure that private parties c[an] claim state-action immunity from Sherman Act liability only when their anticompetitive acts were truly *the product* of state regulation." *Patrick*, 486 U.S. at 100 (emphasis added).

These rationales are entirely consistent with the understanding of the state action doctrine reflected in the Ninth Circuit's *Columbia Steel Casting* decision. That model of the state action doctrine permits private parties to claim the benefit of state-action immunity only when their conduct is fairly attributable to the State, *i.e.*, when it may be said to be "truly *the product* of state regulation." *Patrick*, 486 U.S. at 100 (emphasis added). Thus, for the Ninth Circuit, "[t]he question is whether the [private] anticompetitive actions were authorized [by the the State] when undertaken," not whether they were ever thereafter approved by the State. *See* 60 F.3d at 1398 n.7. *Post hoc* statements of approval by the State are irrelevant under the Ninth Circuit's approach because the private actor "could not have relied upon those statements when it decided" to pursue its anticompetitive course of conduct. *Id.* Consistent with this Court's rationales for extending the state action doctrine to private parties, the Ninth Circuit's requirement of contemporaneous state approval ensures that no individual will be penalized for actions directed by the State and that the State remains free to enlist private actors in implementing state policy prospectively. At the same time, the Ninth Circuit's insistence upon contemporaneous state approval of private anticompetitive behavior safeguards federal antitrust policy by denying States the power to "ratify" past anticompetitive conduct of private parties undertaken without state approval or scrutiny. In this way, the Ninth Circuit's holding remains true to *Parker*'s admonition that federal law, while permitting "a stat[e] control over its officers and agents," does not empower "a state . . . [to] give immunity to those who violate the Sherman Act by authorizing them to violate it, or [simply] by declaring that their action is lawful." 317 U.S. at 351.

This model of the state action doctrine also is more consistent with the focus of the two-pronged inquiry set out in *Midcal Aluminum* for determining when private actors may claim the protection of the State's antitrust immunity. In particular, this Court's emphatic requirement that private conduct be "actively supervised" by the State in order to fall within the state action doctrine seems at odds with a State's power to reach back in time and immunize purely private conduct that at the time of its occurrence may have been wholly unknown to the State. This Court's recent explanation of the "active supervision" requirement underscores this point:

> "*Midcal* confirms that while a State may not confer antitrust immunity on private persons by fiat, it may displace competition with active state supervision if the displacement is both intended by the State and implemented in its specific details. Actual state involvement, not deference to private price-fixing arrangements under the general auspices of state law, is the precondition for immunity from federal law."

Ticor Title, 504 U.S. at 633. Where a State simply reviews and ratifies a private anticompetitive pact years after the fact, the State can hardly be said to have "played a substantial role in determining the specifics of the [challenged] economic policy," *id.* at 635; to the contrary, the State's *post hoc* ratification resembles much more closely the sort of attempt to "confer antitrust immunity on private persons by fiat" that this Court has expressly and repeatedly condemned, *id.* at 633.

b. The Eleventh Circuit's approach in this and other cases reflects a very different model of the state action doctrine. Under this model, the central concern is not whether the private actor may be fairly characterized as an agent of the State, but whether the State chooses, at any time, to adopt the private conduct as its own. Whereas the Ninth Circuit's understanding of the state action doctrine vindicates a State's power to *regulate* private commercial behavior, the Eleventh Circuit's ap-

proach goes further and affirms a State's power to *pardon* past behavior as well.

Thus, in addition to the decision below, several cases have affirmed state-action immunity for private conduct based on subsequent state declarations "ratifying" the private conduct. In *Municipal Utilities Board of Albertville* v. *Alabama Power Co.*, 21 F.3d 384 (11th Cir. 1994), *cert. denied*, 115 S. Ct. 1096 (1995), for example, the Eleventh Circuit affirmed state-action immunity for private utility territorial pacts dating back to 1954 based on a 1985 Alabama statute ratifying those pacts as state policy. Similarly, the Fifth Circuit held that a telephone company's exclusionary rate practices were immune from antitrust scrutiny in part because the state public utility commission had approved the reasonableness of the challenged rates in an order issued *after* the commencement of the litigation. *See DFW Metro Line Servs. v. Southwestern Bell Tel. Corp.*, 988 F.2d 601, 606 (5th Cir.), *cert. denied*, 114 S. Ct. 183 (1993). "Most importantly," the Fifth Circuit held, the existence of a *pending* proceeding before the state utility commission concerning the rates demonstrated that the State was "actively supervising" the private restraint and warranted the allowance of state-action immunity. *See id.* at 606-07. Although such reflexive deference to state expressions of policy pays homage to the "principles of federalism" upon which the state action doctrine rests, *see, e.g., Ticor Title Ins. Co.*, 504 U.S. at 633, it is not easily squared with this Court's explanations of the animating principles of the doctrine and the Court's admonition that extension of the doctrine to protect private parties is "disfavored" and must be confined within narrow bounds. *See Ticor Title Ins. Co.*, 504 U.S. at 636; *Patrick*, 486 U.S. at 100.

Indeed, under similar reasoning, even where a State has not yet reviewed the challenged private restraint, "the regard for state interests that underlies the *Parker* doctrine could suggest that the state be allowed an opportunity to

grant an express approval, once [the] practice is challenged [in court]." I Phillip Areeda & Donald F. Turner, *Antitrust Law* ¶ 213, at 79 (1978) (footnote collecting cases omitted). Although Professors Areeda and Turner ultimately reject this suggestion as inimical to federal antitrust policy, *see id.*, its adoption by some courts reflects the confusion engendered by the existence of competing models of the state action doctrine.

3. Recent cases demonstrate that the factual scenario involved in this case—a State's attempt to confer retroactive immunity upon past private anticompetitive conduct—is hardly unique. In addition to this case, the Ninth Circuit's decision in *Columbia Steel Casting* and the Eleventh Circuit's decision in *Municipal Utilities Board of Albertville* both involved recent state attempts to "ratify" agreements by which private parties had created and enforced exclusive service territories years earlier. Other cases, such as the Fifth Circuit's decision in *DFW Metro Line Services*, although not involving express state attempts to confer retroactive immunity, similarly present the issue whether subsequent state agency review and approval of past private conduct can shield that conduct from antitrust liability. The issue presented by this case is thus both important and recurring.

Even if States are empowered to grant prospective immunity to private parties by reviewing their ongoing anticompetitive conduct and affirming it as state policy, there is no sound reason for permitting them to immunize *past private* conduct that was undertaken without authorization or regulation by the State. Although this Court stated in *Parker* itself that a State may not "give immunity to those who violate the Sherman Act . . . [simply] by declaring that their action is lawful," 317 U.S. at 351, a half-century later lingering uncertainty about the theoretical basis of the state action doctrine continues to lead lower courts to find immunity based upon *post hoc* declarations of state approval.

In this case, Praxair has been forced to pay non-competitive rates for electric service because of a territorial pact entered into by two utilities without state review or approval; the Eleventh Circuit, however, held that this longstanding anticompetitive conduct was wholly immune from antitrust scrutiny based on expressions of state approval that occurred two decades after Praxair received its first electric bill. That holding is possible only under a model of the state action doctrine that ignores this Court's original explanation of the justifications for extending the doctrine to private parties. Because the decision below has broad implications for the scope of the state action doctrine and creates a conflict with the rule of law applied by the Ninth Circuit in *Columbia Steel Casting*, this Court's intervention is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

CARTER G. PHILLIPS
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

NATHAN P. EIMER
CONSTANTINE L. TRELA, JR.*
DAVID D. MEYER
SIDLEY & AUSTIN
One First National Plaza
Chicago, Illinois 60603
(312) 853-7000

Counsel for Petitioner

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* Counsel of Record